DATE: JULY 31, 1996

CASE NO: 94-INA-504

In the Matter of

JOHNSON, JOHNSON & ROY, INC.
Employer

on behalf of

YUN SOO KIM
Alien

BEFORE: JARVIS, VITTONE and WILLIAMS
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Johnson, Johnson & Roy, Inc.'s ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212 (a) (5) (A) of the Immigration and Nationality Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212 (a) (14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: 1) there are not sufficient workers in the United States who are able, willing, qualified and available; and 2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On March 12, 1993, Employer filed a Form ETA 750, Application for Alien Employment Certification with the Texas Employment Commission ("TEC") on behalf of the alien, Yun Soo Kim. AF 75. The job opportunity was listed as Landscape Architect. The job requirements included six years of college, a Master's degree in Landscape Architecture and two years of experience in the job. *Id.* Special requirements consisted of: 1. "Must have the ability to present computer-aided design using AUTOCADD and LANDCADD and GIS software," and 2. "Must be able to research and manage the firm's computer systems." *Id.*

Employer submitted statements of business necessity and infeasibility along with the application. AF 94-95. Thereafter, Employer sent TEC a list of employees who had been laid off since the alien was hired. AF 80. TEC required the job to be advertised. AF 73-74. TEC forwarded one resume to Employer. AF 66-68. In its Result of Recruitment Report, Employer stated that the applicant was not hired because he lacked the required job experience among other reasons. AF 62. The file was transmitted to the CO. AF 57.

On March 28, 1994, the CO issued a Notice of Findings ("NOF") in which she proposed to deny the application. AF 53. The CO found that the Alien did not have the required job experience when he was hired for the job. Employer could not require terms and conditions of employment less favorable to U.S. workers than those offered to the Alien. Under these facts she was unable to determine Employer's actual minimum requirements for the job. AF 54. The CO stated that no documentation had been submitted showing it is not presently feasible from the standpoint of business necessity to hire a worker with less than the experience required. AF 55. Employer was required to submit documentation on business necessity and "documentation which includes, but is not limited

to, position descriptions of similar positions within the Employer's organization and of those employees employed, and of those employees presently employed within the organization who hold the same position." *Id.* On the issue of minimum requirements, the NOF required documentation or amending or deleting the requirements and re-recruiting. *Id.*

Employer filed a timely rebuttal. AF 11. Employer first contended that the NOF was inaccurate when it states that no documentation was submitted on the lack of feasibility of training a U.S. worker for the job. AF 12. Employer cites the material submitted to the TEC. *Id.*; AF 80, 94-95.

The rebuttal contained two lines of argument: 1. The job for which the alien was being hired was a different one than the one for which he was originally hired. The job is a new position. The Alien did not receive his experience for the position at issue while he was on the job. AF 14-17. 2. The decline in non-residential construction has adversely affected Employer's business. It has had to layoff personnel. There is nobody available to train a replacement for the Alien. Training a replacement would be extremely costly. Losing the services of the alien would result in a substantial loss of expected revenues from work in progress. AF 12-14.

The rebuttal included: An affidavit by Dale S. Sass (Sass), one of Employer's principals. A promotional brochure. A Texas Index May/June 1993 of residential and non-residential building permits issued for the years 1986-1992. A letter from John T. Murphy (Murphy), a consulting landscape architect. A letter from Employer to its attorney who represented it in the INS proceedings in which the Alien was granted H-1b status. A letter from Ronald J. Shaw (Shaw) whose firm has collaborated on various projects with Employer. A report of Employer dated October 19, 1992 containing a mission statement and goals. A similar report dated January 5, 1993. A brief prepared by Employer's attorney and various BALCA cases. AF 10-51.

The Texas 1986-1992 Index of building permits indicates that the number for non-residential construction decreased from 29,386 in 1986 to 12,750 in 1992. AF 24. Sass' affidavit states that: Landscape architecture has become computerized over the years. Employer collaborates in multi-disciplinary projects. In most cases the professionals submit AUTOCADD software with the expectation that the other professional on the team will be able to work with it. The Alien, who began working for Employer in 1989, is an expert in AUTOCADD. As reported to TEC, Employer laid off six landscape architects between January 1, 1989 and June 3, 1989. Since June 3, 1989, one

landscape architect was transferred from Dallas to Employer's Washington office and two others resigned. The only professionals left in Employer's Dallas office are James P. Richards, who only works part time; the Alien and Sass. The affidavit states that there is no one in Dallas other than the Alien who could conduct computer training for a new employee; it would cost $85,000 to train a new employee and Employer could not assign a professional to Dallas from its Ann Arbor or Chicago offices to conduct training because Dallas professionals were reassigned for lack of work. Sass also stated that: Employer was engaged in a project due to generate $162,000 in fees. The work for the project must be done entirely on a computer. If the services of the Alien, who is in charge of the project were lost to Employer, the Dallas office and the jobs of the four persons employed there would be jeopardized. AF 20-21.

The letter from Murphy (who had previously worked for Employer) indicated that as a landscape architect consultant he had recommended appropriate CAD systems for design firms, installed and upgraded these systems and provided staff training in their use. Murphy estimated that it would cost $85,000 to train a newly hired staff person with a Master's degree in landscape architecture and associated training one year to reach the Alien's level of AUTOCAD [sic] proficiency. AF 25.

The CO issued a Final Determination ("FD") which denied certification on May 31, 1994. AF 7. The CO found that Employer had failed to document that its requirements for the job opportunity, as described, were its actual minimum requirements; that the Employer had not hired workers with less training or experience for similar jobs and that it is not feasible to hire workers with less experience. AF 8. The FD did not discuss the evidence presented by Employer relating to business necessity and dealing with the infeasibility of hiring a U.S. worker with less training or experience. AF 7-9.

Employer filed a Petition for Reconsideration and/or Review. AF 2-5. The CO denied reconsideration and the file was forwarded for review. AF 1.

DISCUSSION

We need not tarry over Employer's contentions that the job advertised is different from the one which the Alien was hired and that the Alien was not trained on the job. If these were the only issues we would affirm the F.D.

Section 656.21 (b)(5) provides that:

> The employer shall document that its

> requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

It had been held that labor certification will be denied under this section[1/] when the alien has been employed in the position for which certification is sought and has gained experience which is required by the job offer while working for the employer in that position. To invoke the "not feasible" exception the employer is required to document that it is not now feasible to hire workers with less training or experience than that required by the employer's job offer. MMMATS, Inc., 87-INA-540 (November 24, 1987)(*en banc*).

In the case at bench, Employer submitted evidence which showed that Employer was engaged in providing landscape architecture services for non-residential construction. AF 22-23. The substantial decrease in Texas non-residential construction since the Alien was hired has adversely affected its business. AF 24. Between January 1, 1989, when the Alien was hired, and June 3, 1989 Employer has laid off six landscape architects in its Dallas office. AF 80. Since June 3, 1989 one landscape architect was transferred from Dallas to Employer's Washington office and two others resigned. AF 21. Presently the only professionals employed in the Dallas office are Sass; Richards, who only works part-time, and the Alien. *Id.* Sass' affidavit states that other than the Alien, there is no one in the Dallas office capable of conducting the computer training necessary for the job. *Id.* Employer could not assign anyone from the other offices to conduct the training because of the lack of work for such person in the Dallas office. *Id.* It would cost $85,000 to train a new employee utilizing outside resources. AF 21, 25. The Alien was in charge of a project for Employer which required the work to be done entirely by computer and was expected to generate $162,000 in fees. If the Alien could not do the project and it were lost to the Employer, the Dallas office and the jobs of the four persons employed there would be jeopardized. AF 20-21.

As indicated, the CO did not discuss any of the evidence presented by Employer on the question of the non-feasibility of

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[1/] The section was previously numbered 656.21 (b)(6).

hiring a worker with less training and experience than required by its job offer. We hold that under the particular facts of this case, Employer has established that it is not feasible. *Avicom International,* 90-INA-284 (July 31, 1991); *Barbara Harris,* 88-INA-284 (April 5, 1989)(*en banc*).

ORDER

The Certifying Officer's denial of Labor Certification is reversed and the Certifying Officer is directed to grant labor certification.

FOR THE PANEL:

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DONALD B. JARVIS
Administrative Law Judge

DBJ/jmr/bg

Chief Judge John M. Vittone, dissenting.

I would find that the Employer has not established infeasibility to train in this case, especially in light of the fact that Employer, in the four years prior to application for labor certification, laid off several employees and transferred one to another office who held the same position as the alien. The burden on Employer to establish infeasibility to train a U.S. worker when the alien has been trained by Employer is a heavy one. *58th Street Restaurant Corp.*, 90-INA-58 (Feb. 21, 1991). Employer freely admits that it has other offices which employ persons in the same position as the alien. It has not made it clear why one of these landscape architects is not able to train a U.S. worker as the alien was trained. The landscape architects in the other offices are presumably already on the payroll of Employer and would not be an added expense overall to the company. Although Employer states that it could not afford to pay someone out of its Dallas office, this office cannot be viewed in a vacuum. If Employer had only one office and could demonstrate that it did not have the resources to train someone in that office because of decline in business and that the alien was the only one in the office capable of performing the duties of landscape architect, infeasibility to train could be found. However, these are not the circumstances in this application. Employer has other employees in other offices that are capable of performing the duties and training a new U.S. worker. In addition, Employer has laid off U.S. workers in the Dallas office within the four years prior to the application and transferred on landscape architect to another office, therefore creating the situation where it could argue infeasibility to train. Under these circumstances, I would AFFIRM the CO's denial of labor certification.